No. 49636-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARK IPPOLITO,
Appellant,

vs.

LEAH AND "JOHN DOE" HENDERSON,

Respondent.

AMENDED BRIEF OF RESPONDENT

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I. INTRODUCTION

Mr. Ippolito filed a request for trial de novo following an unfavorable mandatory arbitration award. Shortly before trial, he changed his mind and sought a voluntary nonsuit. Because caselaw prohibits a voluntary nonsuit under these circumstances, the trial court denied the motion. Mr. Ippolito now appeals.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court correctly deny Mr. Ippolito's motion for voluntary nonsuit under Thomas-Kerr, 114 Wn. App. 554, 563, 59 P.3d 120 (2002), which holds that MAR 6.3 does not allow a plaintiff to nonsuit a case following a decision by the arbitrator?

III. STATEMENT OF THE CASE

The parties submitted this personal injury case to mandatory arbitration. CP 45. Mr. Ippolito was displeased with the arbitrator's award and requested trial de novo. CP 46.

One week before trial, he had a change of heart and filed a motion for voluntary nonsuit. CP 7-8. The trial court denied the motion under Thomas-Kerr v. Brown, 114 Wn. App. 554, 59 P.3d 120 (2002), and ruled that while Mr. Ippolito was not entitled to nonsuit his case, he could withdraw his request for trial de novo. CP 19. Mr. Ippolito declined to do so and proceeded to trial, presenting no witness testimony or documentary

evidence to support his case. CP 21-22. Ms. Henderson moved for a directed verdict, and the trial court granted her motion. CP 22. The trial court then awarded Ms. Henderson attorney fees and costs pursuant to MAR 7.3 and RCW 7.06.060. CP 23-24.

Mr. Ippolito appeals. CP 25.

IV. ARGUMENT

A. Standard of review.

Interpretation of court rules is a matter of law that requires this court to review the trial court's ruling de novo. Thomas-Kerr, 114 Wn. App. at 557. An order denying a motion to dismiss is reviewed for manifest abuse of discretion. *Id.* An abuse of discretion exists when a court's decision "is manifestly unreasonable or based upon untenable grounds or reasons." *Id.* at 557-58.

B. Mr. Ippolito was not entitled to circumvent MAR 6.3 by nonsuiting his case after the arbitration award was issued.

Mr. Ippolito attempted to use CR 41 as a loophole on the eve of trial to secure a more favorable position. If he could obtain a voluntary nonsuit, Mr. Ippolito could secure a double windfall: he could both avoid the unfavorable arbitration award and have the freedom to start anew with fresh litigation. If his motion had been granted, Mr. Ippolito could have negated the documentary evidence offered by Ms. Henderson without

objection under ER 904, then refilled his case, potentially placing the case back into Mandatory Arbitration a second time, in hopes of getting a better result. If he still was not satisfied with the arbitration result, he could then file yet another request for trial *de novo* and have a third shot at prevailing.

The trial court saw through this charade and denied Mr. Ippolito's motion. The trial court's decision followed the unequivocal holding in Thomas-Kerr and complied with the MARs, and thus was not error.

In Thomas-Kerr, the plaintiff attempted a similar feat of legal gymnastics to avoid the effect of MAR 6.3. In that case, the plaintiff sought a voluntary nonsuit to avoid entry on judgment on an arbitration award when the defendant withdrew his request for trial de novo. Id. at 122. Rather than accept the arbitration award, the plaintiff moved to nonsuit his case. Id. The trial court denied the motion for voluntary nonsuit and the plaintiff appealed. Id. The court of Appeals affirmed, explaining that while a case is assigned to an arbitrator, the plaintiff has the ability to withdraw under CR 41(a). Id. at 562. However, once the arbitrator makes an award, the plaintiff no longer has the right to withdraw without permission. Id. The court thus held:

> Although the MAR provide limited relief from a judgment following an arbitration award, CR 41(a) cannot be used to circumvent the arbitration statute and the finality of judgments. Once the arbitrator presents an award to the court, either party has 20 days to appeal the decision. If neither party appeals in the 20-

> day period, MAR 6.3 requires the court to enter a judgment. **MAR 6.3 does not allow a plaintiff to nonsuit a case following a decision by the arbitrator.**

Thomas-Kerr, 114 Wn. App. 554, 563, 59 P.3d 120 (2002) (emphasis added).

Under the Thomas-Kerr holding, MAR 6.3 allows only two options following the presentation of the arbitrator's award: trial de novo or entry of judgment on the arbitrator's award.[1] There is no option to trump MAR 6.3 by nonsuiting the case under CR 41 so that the plaintiff can start afresh by refilling the case.

The very purpose of the MARs is to reduce court congestion of civil cases. Malted Mousse, Inc. v. Steinmetz, 150 Wn.2d 518, 526, 79 P.3d 1154 (2003). Specifically, MAR 7.3 is intended to encourage parties to accept the arbitrator's award by penalizing unsuccessful appeals from them. Walji v. Candyco, Inc., 57 Wn. App. 284, 290, 787 P.2d 946 (1990). Moreover, that the law frowns on the use of procedural tactics to substantially delay the resolution of cases on the merits. *See, e.g.*, CR 1 (superior court civil rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action"); RPC 3.1 and 3.2. Allowing a party to prolong litigation by manipulating procedure as Mr. Ippolito is attempting to do here only serves to frustrate this

[1] Of course, parties are also entitled to settle as they see fit.

purpose. It leads to prolonged litigation, excessive expense, and judicial inefficiency.

Mr. Ippolito urges the court to apply the holding in Walji v. Candyco, Inc., 57 Wn. App. 284, 787 P.2d 946 (1990), but that case did not address this issue. As the court stated at the start of its opinion:

> Queen Anne Group appeals from the order awarding attorney fees, and the subsequent judgment, **but does not appeal from the order of dismissal.**

Id. at 287. The court in Walji therefore did not examine whether the decision to grant a voluntary dismissal itself was erroneous. Id. Rather, the issue was whether terms should be imposed upon voluntary dismissal. Id. The court held that any error in the court's order imposing terms following the voluntary dismissal was harmless because the court awarded attorney fees based on the parties' contract and MAR 7.3, not on CR 41. Id. Walji did not examine the propriety of a granting a voluntary dismissal as opposed to requiring a party to withdraw the request for trial de novo. Id. It thus has no application here.

Mr. Ippolito also appears to rely on Nguyen v. Glendale Const. Co., 56 Wn. App. 196, 782 P.2d 1110 (1989), although it is unclear what his argument is with regard to the Nguyen case. Nguyen does not pertain to an appeal from the denial of motion for voluntary dismissal under CR 41. Id. While one of the parties to that case was nonsuited, the order

granting nonsuit was not reviewed by the court of appeals and was only mentioned in passing when the court addressed the award of attorney fees. Id. at 205. Nguyen has no applicability here.

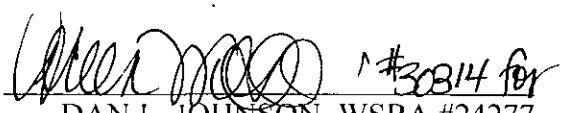
C. Ms. Henderson is entitled to an award of attorney fees and costs.

As the prevailing party on appeal, Ms. Henderson is entitled to an award of fees and costs under RAP 14.2.

V. CONCLUSION

Therefore, for the reasons set forth above, this court should affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 18 day of April, 2017.



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DECLARATION OF SERVICE OF AMENDED BRIEF OF RESPONDENT

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Original

I, Maryam Romani, under penalty of perjury under the laws of the State of Washington, declare the following statement is true:

I am over the age of 18, competent to testify, not a party to this action, and employed by the firm of Wieck Wilson, PLLC.

On the date April 3, 2017, I served Brief of Respondent in the manner noted, on the following person(s):

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
Sean P. Wickens Wickens Law Group, P.S. 602 S. Yakima Tacoma, WA 98405	( ) Via U.S. Mail (✓) Via Legal Messenger ( ) Via Facsimile ( ) Via Overnight Mail

SIGNED at Bellevue, Washington, this 3rd day of April, 2017.

MARYAM ROMANI